FILE COPY

OCT 8 19

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1931

No. 40

STATE TAX COMMISSION OF MISSISSIPPI, et al.,
Appellants,

vs.

INTERSTATE NATURAL GAS COMPANY,
INCORPORATED, Appellee

BRIEF OF APPELLEE

DAVID CLAY BRAMLETTE,
Attorney for Appellee

LAUDER & ARNOLD - MEMPHIS

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1931

No. 40

STATE TAX COMMISSION OF MISSISSIPPI, et al.,
Appellants,

vs.

INTERSTATE NATURAL GAS COMPANY,
INCORPORATED, Appellee

BRIEF OF APPELLEE

DAVID CLAY BRAMLETTE,
Attorney for Appellee.

INDEX

	Page
Final Decree Below	5
History of Case	5
The Issues	7
The Statute Involved	8
The Facts	11
Summary of Argument	16
Argument	16
I. Appellee Is Engaged Wholly And Exclusively In Interstate Commerce In Mississippi	16
II. Acts of Appellee In Mississippi Are Exclusively In Furtherance Of Appellee's Interstate Commerce	23
III. Had Appellee Been Engaged In Intrastate Business, The Statute Involved Does Not Impose A Privilege Tax Solely On Intrastate Business, But Affirmatively Imposes A Privilege Tax On One Engaged Exclusively In Interstate Business	27
Cases Relied Upon By Appellants	29
Conclusion	32

AUTHORITIES CITED

Alpha Port. Cement Co. v. Massachusetts, 268 U. S. 203	30
Atlantic Coast Line R. Co. v. Standard Oil Co., 275 U. S. 257	32
B. & O. S. W. R. Co. v. Settle, 260 U. S. 166	27
Brown v. Maryland, 12 Wheaton 419	27
Burnet v. Niagara Falls Brewing Co., 51 S. Ct. 262	27
Conrad v. Miss. State Tax Comm., 133 So. 652	27
Dozier v. Alabama, 218 U. S. 124	27

Page

East Ohio Gas Co. v. Tax. Comm. of Ohio, 51 S. Ct. 499 ..... 21, 27

Furst v. Brewster, 51 S. Ct. 295 25

I. C. R. Co. v. Miss. R. Comm., 229 F. 248 29

McCulloch v. Maryland, 4 Wheat. 316 28

McKenzie v. Adams Banks Lbr. Co., 157 Miss. 482 27

Miller v. I. C. R. Co., 146 Miss. 422 27

Missouri v. Kansas Natural Gas Co., 265 U. S. 298 16

Ozark Pipe Line Corp. v. Monier, 266 U. S. 555 18

Public Utilities Comm. v. Landon, 249 U. S. 236 20

Sprout v. South Bend, 277 U. S. 263 ..... 28, 31

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1931

No. 40

STATE TAX COMMISSION OF MISSISSIPPI, et al.,
Appellants,

vs.

INTERSTATE NATURAL GAS COMPANY,
INCORPORATED, Appellee

BRIEF OF APPELLEE

I.

FINAL DECREE OF COURT BELOW

The final decree of the Court below may be found at pages 58 to 60 inclusive record.

II.

HISTORY OF CASE

The bill of complaint of Interstate Natural Gas Company, Incorporated, appellee, was filed in the United States District Court of the Southern District of Mississippi, seeking to restrain the State Tax Commission of Mississippi and the Attorney-General of Mississippi from collecting a

privilege tax imposed upon appellee by Section 163 of Chapter 88 of the Laws of 1930 of Mississippi designated as the "Privilege Tax Law of 1930," and from otherwise enforcing the provisions of said law against appellee, upon the ground of the unconstitutionality of said statute (R. 1); whereupon, under Section 380 of United States Code, being Section 266 of the Judicial Code, the case was heard before a Court composed of Circuit Judge Foster and District Judges Holmes and Borah, on bill of complaint of appellee, answer of appellants and an agreed statement of facts (R. 55), on September 29, 1930, when appellee was granted an interlocutory injunction, restraining the collection of said privilege tax from appellee and otherwise from enforcing the provisions of said statute against appellee.

The final hearing was had in New Orleans on February 20, 1931, and the interlocutory injunction was made permanent. The finding of facts by the Court in accord with the agreed statement was as a basis of the decision, that appellee, incorporated under the Laws of Delaware, domiciled therein at Wilmington, owns and operates for the transportation or transmission of natural gas, owned and acquired by appellee in the State of Louisiana, to distributors, a trunk pipe line or lines, extending from the northern part of the State of Louisiana through Mississippi and again into Louisiana; that less than one per cent of the gas flowing through said pipe line is transported to distributors in Mississippi, where appellee does not sell any natural gas at retail; the Court further found that the sale of natural gas in Mississippi was provided for in two contracts executed at a main office of appellee in New York City, prior to the delivery of said natural gas in said trunk pipe line or lines, and payments for said natural gas are made at the office of appellee in Monroe, Louisiana; that said natural gas flows continuously from Louisiana in said

trunk pipe line or lines, to the points of delivery in Mississippi, where the pipe line of appellee is tapped by lines of two distributors, and meters are furnished and provided by appellee to measure the amount of gas sold to the two Mississippi distributors; that all transportation or transmission of natural gas into and through Mississippi, is continuous and without interruption and appellee does not store any of said natural gas for any time or in any quantity in the State of Mississippi. The conclusions of the Court were that appellee is engaged wholly and exclusively in interstate commerce in the State of Mississippi and that the statute exacting a privilege tax from appellee contravenes Article 1, Section VIII, Clause 3, or the Commerce Clause, of the Constitution of the United States and is, therefore, invalid and void as affecting appellee, Interstate Natural Gas Company, Incorporated, because the said privilege tax law unduly burdens interstate commerce and constitutes an unreasonable interference therewith. R 58.

As provided for by Section 345 of United States Code, being Section 238 of the Judicial Code, the final judgment of the Court below is brought by appeal for a review by this Court.

III.

THE ISSUES

The questions confronting the Court are:

1. Whether by prior contract, executed in New York, the transportation or transmission of natural gas by pipe line from Louisiana into Mississippi to two distributors, payment therefor being made in Louisiana, constitutes interstate commerce; and whether transporting natural gas by pipe line from Louisiana *through Mississippi* into Louisiana constitutes interstate commerce in Mississippi.

2. Whether appellee, engaged in such commerce, may be subjected by a statute of the State of Mississippi to the payment of a privilege tax, the payment thereof being a condition precedent to appellee engaging in such commerce in Mississippi and, further, subjected to the penalties and numerous criminal prosecutions, provided for, on failure to pay said privilege tax.

IV.

THE STATUTE INVOLVED

The statute involved is Chapter 88 of the Laws of 1930 of Mississippi, therein designated as the "Privilege Tax Law of 1930," and the section providing for and fixing the amount of the privilege tax to be collected from appellee follows:

> "SEC. 163. PIPE LINE COMPANY.—Upon each person engaging and/or continuing in this state in the business of operating a pipe line or transporting in *or through this state* oil, or natural, or artificial gas, through pipes, and/or conduits, a tax as follows:
>
> On each mile of pipe having a diameter of 20 inches or more $50.00
>
> On each mile of pipe having a diameter of 15 inches and less than 20 inches 35.00
>
> On each mile of pipe having a diameter of 12 inches and less than 15 inches 25.00
>
> On each mile of pipe having a diameter of less than 12 inches 10.00
>
> The term 'pipe line' as used in this section shall include *only trunk lines* and shall not opply to those pipe lines used solely for distributing gas or oil in or near cities, towns and villages (known as service lines), to

the ultimate consumer. And this section shall not apply to those persons, firms or corporations mining and/or producing gas or oil on which a privilege tax measured by gross production is imposed and paid in this state."

(Italics ours).

Section 3 of said statute follows:

"PRIVILEGE TAXES IMPOSED.—Every person desiring to engage in any business, or exercise any privilege hereinafter specified, shall first, *before commencing same,* apply for, pay for, and procure from the proper officer a privilege license authorizing him to engage in the business, or exercise the privilege specified therein; and the amount of tax shown in the following schedules is hereby imposed for the privilege of engaging and/or continuing in the business set out therein." (Italics ours)

Section 225 of said statute provides:

"DAMAGES AND PENALTY FOR FAILURE TO PROCURE LICENSE.—All persons liable for privilege taxes who shall fail to procure the license therefor *before beginning the business* for which a privilege tax is required by law, or who shall fail to renew, during the month in which it is due, the license in a business for which he has theretofore procured a privilege license, shall in each or either such instance be liable for *double* the amount of the tax required for such business, and it is hereby made the duty of the collector whose duty it is to collect the tax on such business to collect the said tax *penalty,* issue a separate license for the tax, and for the penalty, and to endorse across the face of the license issued as a penalty the words: 'Collected as Damages'; and they shall account for all such penalties, less commissions, as they are required to account for other privilege taxes. In addition to the hereinabove described *penalties* the delinquent taxpayer shall be *guilty of a misdemeanor and subject to the penalties therefor.*" (Italics ours).

Section 1314 of the Mississippi Code of 1930 provides:

"PENALTY WHERE NONE FIXED ELSEWHERE BY STATUTE.—Offences for which a penalty is not provided elsewhere by statute, and offences indictable at common law, and for which a statutory penalty is not elsewhere prescribed, shall be punished by fine of not more than $500.00 and imprisonment in the county jail not more than six months, or either."

Section 240 of the statute involved provides:

"OFFICER LIABLE FOR TAXES WHICH HE MIGHT BUT FAILS TO COLLECT.—The tax officer required to collect privilege taxes shall require all persons liable to pay a privilege tax to pay the same; and he shall cause all persons doing business without a privilege license to be *prosecuted*. The tax officer required to collect privilege taxes shall be liable for wilful failure to collect the same in the same manner as for failure to collect ad valorem taxes, and the liability of such officer shall extend to all cases where he might collect such taxes but negligently fails to do so. The demand required by this section shall not be necessary to render *liable* the taxpayer to the *penalty of doing business without first paying the tax.*" (Italics ours)

Section 242 of the statute involved provides:

"PENALTIES.—Any person violating any of the provisions of this chapter shall be *guilty of a misdemeanor* and on conviction thereof shall be fined not more than $500.00 *or imprisoned in the county jail not exceeding six months,* or by *both such fine and imprisonment* in the discretion of the court within the limitations aforesaid; and *such fine and imprisonment shall be in addition to any other penalty* imposed by any particular section of this chapter (act). The courts of

the county in which the offender resides, or if a company, in which it carries on business, shall have jurisdiction to enforce this section." (Italics ours)

V.

THE FACTS

The agreed statement of facts (R. 55) discloses that:

Appellee is incorporated under the laws of Delaware and domiciled therein at Wilmington, having main office in New York City, New York, and an office at Monroe, State of Louisiana, and is the owner of a large acreage of proven mineral lands in the area known as the Monroe Gas Field in the State of Louisiana, and from these and other lands in the Monroe Gas Field in the State of Louisiana, appellee owns and is constantly acquiring gas. In finding a market for said natural gas, appellee has constructed, owns and operates for the transportation or transmission of said natural gas to distributors a trunk line or lines, extending from the northern part of the State of Louisiana in a southeasterly direction through the State of Mississippi, and again into the State of Louisiana. Approximately 70,000,000 cubic feet of natural gas are sold and transported daily through Mississippi and again into Louisiana to distributors during the summer period, and about 75,000,000 cubic feet daily during the winter months. Approximately 204,000 cubic feet during the summer are sold and transported daily into Mississippi to two distributors and approximately 520,000 cubic feet daily during the winter months. For the greater part of this gas thirty-five cents per thousand cubic feet is received and for the balance twenty cents per thousand cubic feet is received. The gas sold and transported into Mississippi is less than 1% of the gas flowing through Mississippi and again into Louisiana. Approximately for

gas sold and transported into Mississippi the amount of $46,754.00, annually, is derived. The annual privilege tax demanded of appellee under the Mississippi statute involved is $3,873.65.

Exhibits A and B to the agreed statement of facts are two contracts between the municipality of Woodville, Mississippi, and appellee and Central Power and Light Company, respectively, the interests of Central Power and Light Company in the contract designated as exhibit A, having been assigned to Mississippi Power and Light Company. The municipality of Woodville and Mississippi Power and Light Company distribute natural gas at retail to consumers in Woodville, Mississippi, and Natchez, Mississippi, respectively. These two contracts were executed in New York City, New York, and payments for natural gas purchased by the distributors, Mississippi Power and Light Company of Natchez and the municipality of Woodville, are made at the office of Interstate Natural Gas Company, Incorporated, in Monroe, Louisiana, R. 56. As a part of their distribution systems, the Natchez and Woodville distributors, respectively, have constructed a pipe line from Natchez and Woodville, respectively, to the trunk pipe line of appellee, gas flowing therefrom on a wholesale basis into said pipe lines of said respective distributors, and the said natural gas flows continuously where the pipe line of appellee is tapped and where a meter is furnished by appellee, both at Natchez and at Woodville, for measuring the gas sold and delivered under said contracts, all of said transportation or transmission of natural gas being continuous and without interruption. R. 57.

The agreed statement of facts further discloses that appellee does not store any of said gas for any time or in any quantity in the State of Mississippi. R. 57.

The essential provisions of the two contracts being the same, by agreement, only exhibit A or the contract between appellee and Central Power and Light Company, subsequently succeeded by Mississippi Power and Light Company is set out in full in the record. R. 39. This contract was entered into on March 10, 1927, and recites that, whereas, appellee is constructing a pipe line from its natural gas properties in the Monroe Gas Field to the refinery of the Standard Oil Company of Louisiana near Baton Rouge to supply gas for the fuel requirements of said refinery and desires to dispose of its surplus gas, and, whereas, Central Power and Light Company, which distributes artificial gas in Natchez, Mississippi, proposes to convert its plant to a natural gas system and desires to purchase from appellee its supply of natural gas under the terms thereof, therefore, agreement between appellee, thereinafter called "vendor" and Central Power and Light Company thereinafter called "vendee" was entered into and further terms and conditions set out. Vendor agreed to sell and vendee agreed to purchase and receive from vendor all of the natural gas necessary to meet the requirements of the various consumers of vendee in Natchez, Mississippi, for a term of ten years, commencing from date of first delivery of gas to vendee not earlier than March 1, 1927, and not later than May 1, 1927. Vendee, in addition to supplying consumers in Natchez reserved the right to serve consumers along the transmission pipe line to be built by vendee between point of delivery by vendor and the city limits of Natchez. R. 40. Vendee was to have in readiness its distribution system not later than April 1, 1927, nor earlier than March 1, 1927, in Natchez, of such capacity and design as to furnish a sufficient and adequate supply of natural gas through said city at a pressure as uniform as is practicable and vendee obligated itself to construct a pipe line from its distribution

system in Natchez to a tap in vendor's 22-inch pipe line, located on Minor Plantation, south of Natchez. R. 41. The contract further provided that the delivery of gas to vendee should be at or about a pressure of 50 pounds per square inch above atmosphere and vendor agreed to maintain at the point of delivery the necessary regulator to accomplish delivery at or about said pressure; the unit of measurement is set out. R. 41. Vendor agreed to furnish a Westcott Orfice meter or other standard style agreed upon, and provision was made for the testing of said meter. R. 42. In the event of disagreement as to the quantity of gas furnished arbitration is provided for. R. 43. In addition to the meter furnished by vendor, provision is made for a meter to be furnished by vendee. R. 43.

Under the contract the prices to be paid by the vendee to the vendor are set out. R. 44. On or before the 20th day of each calender month, the contract provided, the vendee shall pay to the vendor at Monroe, Louisiana, for all gas delivered by vendor to vendee. R. 45, 46. The vendor expressly agreed that it would exercise reasonable diligence and care to avoid any shortage or interruption in the supply of natural gas under the contract. R. 46, 47. It was agreed that vendor may interrupt its service to vendee only for the purpose of making necessary alterations and repairs, and then only for such time as may be reasonable or unavoidable and vendor shall give to vendee, except in case of an emergency, reasonable notice of any necessary interruption, and vendor shall endeavor to arrange such interruption so as to inconvenience vendee and its consumers as little as possible. R. 47. The contract further provided that the failure of the vendee to make payments to the vendor for gas purchased in accordance with the provisions of the contract should entitle vendor to terminate the contract. R. 49.

Detailed references to the contract are made to demonstrate that it is a prior contract of sale as definite and as fixed as it could be in advance of delivery of natural gas sold by vendor to vendee. Under the contract, at the point where the Natchez distributor connected with the high pressure 22 inch trunk line of appellee, it was necessary that a regulator be furnished through which the gas flows from the trunk line to the distributor's line, merely, however, to reduce the pressure just as it is necessary for the gas to flow through a meter at the point of delivery in order to ascertain the quantity delivered and in addition a thermometer was necessary to ascertain the temperature, necessary in the unit of measurement. With all due respect to opposing counsel, we are unable to find anything in the contract indicating that appellee "treated" or "prepared" the gas at the time of delivery as indicated in the analysis of facts by appellants.

The agreed statement of facts further discloses that as a part of the trunk line of appellee, extending from Louisiana through Mississippi and again into Louisiana appellee has 72.42 miles of pipe having a diameter of 22 inches, 8.11 miles of pipe having a diameter of 12 inches, and 4.99 miles of pipe having a diameter of 10 inches, all located in Wilkinson and Adams County, Mississippi, of the total value in Mississippi in excess of $2,000,000.00 and in Louisiana the total value of the pipe line exceeds $15,000,000.00. R. 57. The agreed statement further sets out that unless enjoined, defendants will enforce the said Privilege Tax Law of 1930 of Mississippi against appellee; further that there is no way to determine in advance how much gas will pass through the points of delivery near Natchez and Woodville, respectively, where the trunk pipe line of appellee is tapped and a quantity can only be determined after it has passed through said meters near Natchez and Woodville, respectively. R. 58.

SUMMARY OF ARGUMENT

1. Appellee is engaged wholly and exclusively in interstate commerce in Mississippi, and the statute involved, attempting to exact a privilege tax as a condition precedent to appellee engaging in interstate commerce in Mississippi, with the numerous provisions for penalties, fines and terms of imprisonment for failure to pay this privilege tax, contravenes the Constitution of the United States.

2. Acts of appellee in Mississippi are exclusively in furtherance of appellee's interstate commerce.

3. Had appellee been engaged in intrastate business, the statute involved does not impose a privilege tax solely on intrastate business, but affirmatively imposes a privilege tax on one engaged exclusively in interstate business.

ARGUMENT

I.

APPELLEE IS ENGAGED WHOLLY AND EXCLUSIVELY IN INTERSTATE COMMERCE IN MISSISSIPPI.

In the case of *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, 44 S. Ct. 544, the Supreme Court of United States held that the transportation of gas from one state to another is interstate commerce, and the sale and delivery of it to local distributing companies is a part of such commerce to quote from the opinion of Mr. Justice Sutherland at page 545:

> "The business of the Supply Company, with an exception not important here, is wholly interstate. The

sales and deliveries are in large quantities not for consumption, but for resale to consumers. There is no relation of agency between the Supply Company and the distributing companies, or other relation except that of seller and buyer (Public Utilities Comm. v. Landon, 249 U. S. 236, 244-245, 39 Sup. Ct. 258, 63 L. Ed. 577), and the interest of the former in the commodity ends with its delivery to the latter, to which title and control thereupon pass absolutely. The question is therefore presented in its simplest form, and, if the claim of state power be upheld, it is difficult to see how it could be denied in any case of interstate transportation and sale of gas. Both federal courts denied the power. The state court conceded that the business was interstate and subject to federal control, but rested its decision the other way upon the fact that Congress had not acted in the matter and that, in the absence of such action, it was within the regulating power of the state.

(2) The question is controlled by familiar principles. Transportation of gas from one state to another is interstate commerce, and the sale and delivery of it to the local distributing companies is a part of such commerce. In Public Utilities Comm. v. Landon, supra, at page 245 (39 Sup. Ct. 269) this court said:

'That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted; also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state.'

See Pennsylvania v. West Virginia, 262 U. S. 553, 596, 43 Sup. Ct. 658, 67 L. Ed. 1117) and cases there cited. (3, 4) The line of division between cases where, in the absence of congressional action, the state is authorized to act, and those where state action is precluded by mere force of the commerce clause of the

Constitution, is not always clearly marked. In the absence of congressional legislation, a state may constitutionally impose taxes, enact inspection laws, quarantine laws, and generally, laws of internal police, although they may have an incidental effect upon interstate commerce. Pennsylvania Railroad Co. v. Hughes, 191 U. S. 477, 488-491, 24 Sup. Ct. 132, 48 L. Ed. 268. But the commerce clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce. In Minnesota Rate Cases, 230 U. S. 352, 396, 33 Sup. Ct. 729, 739 (57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18), Mr. Justice Hughes, speaking for the court said:

'If a state enactment imposes a direct burden upon interstate commerce, it must fall, regardless of federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which in the absence of federal regulation should be free.'

The question is so fully discussed in that case, that nothing beyond its citation is required."

The Ozark Pipe Line Corporation is a Maryland corporation that owns and operates a pipe line, extending from within Oklahoma, through Missouri, to a point in Illinois. The District Court of the United States for the Western District of Missouri upheld a statute providing for an annual franchise tax equal to one-tenth of one per cent of the par value of the capital stock and surplus of a foreign corporation employed in business in Missouri. On appeal, Mr. Justice Sutherland in the case of *Ozark Pipe Line Corporation v. Monier*, 266 U. S. 555, 45 S. Ct. 184, 185, said:

"The tax is one upon the *privilege or right to do business* (State ex rel v. State Tax Commission, 282 Mo. 213, 234, 221 S. W. 721), and if appellant is engaged only in interstate commerce it is conceded, as it

must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. Leloup v. Port of Mobile, 127 U. S. 640, 648, 8 S. Ct. 1380, 32 L. Ed. 311; Kansas City Ry. v. Kansas, 240 U. S. 227, 231, 36 S. Ct. 261, 60 L. Ed. 617, and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce and beyond the power of state taxation. Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 272, 42 S. Ct. 101, 66 L. Ed. 227; United Fuel Gas Co. v. Hallanan, 257 U. S. 277, 42 S. Ct. 105, 66 L. Ed. 234. But the contention in justification of the tax is that appellant is also engaged in doing local business, the basis of such contention being the facts concerning its ownership and use of property, other than the pipe line, and its various acts and activities within the state hereinbefore recited, and, further, that the purposes for which it is incorporated, as declared in its articles, comprehend other activities than that of transporting petroleum, namely, the acquisition and operation of telegraph and telephone lines, dealing in and transporting merchandise, etc."

And again at page 186:

"The present case comes within the reasoning of the two decisions last cited. (Norfolk R. Co. v. Pennsylvania, 136 U. S. 114, 120, 10 S. Ct. 958, 960, 34 L. Ed. 394, and Heyman v. Hays, 236 U. S. 178, 35 S. Ct. 403, 59 L. Ed. 527). The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character,

was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected. Heyman v. Hays, supra, page 186 (35 S. Ct. 403)."

The fact that no oil was received or delivered in the State of Missouri did not affect in the slightest the interstate commerce engaged in, because it is just as much interstate commerce to transport oil from Oklahoma into Missouri as it is to transport oil from Oklahoma through Missouri into Illinois; and in the case before the Court it is just as much interstate commerce to transport natural gas from Louisiana into Mississippi as it is to transport natural gas from Louisiana through Mississippi and again into Louisiana.

Natural gas flowing through a pipe line from one state into another and sold and delivered to a distributor, is interstate commerce, to quote from an opinion by Mr. Justice McReynolds in the case of *Public Utilities Commission of Kansas v. Landon,* 249 U. S. 236, 39 S. Ct. 268:

"That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interferenec by the state. American Express Co. v. Iowa, 196 U. S. 133, 143, 25 Sup. Ct. 182, 49 L. Ed. 417; Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193; Haskell v. Kansas Natural Gas Co., 224 U. S. 217, 32 Sup. Ct. 442, 56 L. Ed. 738. But in no prop-

er sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burnertips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. Payment to the receivers of sums amounting to two-thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage by agent or otherwise in the retail transactions carried on by the local companies. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods. Rearick v. Pennsylvania, 203 U. S. 507, 512, 27 Sup. Ct. 159, 51 L. Ed. 295; The Pipe Line Cases, 234 U. S. 548, 560, 34 Sup. Ct. 956, 58 L. Ed. 1459. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own accont and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains."

Section 157 of the Privilege Tax Law of 1930 of Mississippi, the statute involved, provides that the annual privilege tax imposed and levied, is in addition to any and all other taxes imposed by law; it is not a tax on property nor in lieu of a property tax.

In the case of *East Ohio Gas Company v. Tax Commission of Ohio et al.*, 51 S. Ct. 499, decided May 18, 1931, Mr. Justice Butler said:

"The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure

transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that state. The mere fact that the title or the custody of the gas passes while it is en route from state to state is not determinative of the question where interstate commerce ends. Public Utilities Comm. v. Landon, 249 U. S. 239, 245, 39 S. Ct. 268, 63 L. Ed. 577; Missouri v. Kansas Gas Co., 265 U. S. 298, 307-309, 44 S. Ct. 544, 68 L. Ed. 1027; People's Gas Co. v. Pub. Ser. Comm., 270 U. S. 550, 554, 46 S. Ct. 371, 70 L. Ed. 726; Pub. Util. Comm. v. Attleboro Co., 273 U. S. 83, 89, 47 S. Ct. 294, 71 L. Ed. 549. But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale, and sold at retail. State v. Flannelly, 96 Kan. 372, 383-384, 152 P. 22; W. Va. & Md. Gas Co. v. Public S. Com., 134, Md. 137, 143-145, 106 A. 265. Cf. Atlantic Coast Line v. Standard Oil Co., 275 U. S. 257, 269, 48 S. Ct. 107, 72 L. Ed. 270; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; Leisy v. Hardin, 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128. It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce, but a business of purely local concern exclusively within the jurisdiction of the state."

Appellee, Interstate Natural Gas Company, Incorporated, is engaged solely and exclusively in transporting natural gas from Louisiana into Mississippi and through Mississippi and again into Louisiana. Appellee does not sell gas at retail but sells it wholesale only to distributors on prior order and contract of sale before the transportation of the gas is started from Louisiana. Interstate Natural Gas Company, Incorporated, does not retail gas to consumer but in the State of Mississippi that is done by the Mississippi Power and Light Company at Natchez and the municipality of Woodville at Woodville. In other words the Mississippi Power and Light Company and the municipality of Woodville in the State of Mississippi occupy the same position as the East Ohio Gas Company does in the State of Ohio in the retail distribution of gas to consumers. From no fact in this case may it be inferred that Interstate Natural Gas Company, Incorporated, "treats" or "prepares" or "sells at retail" natural gas as was done by East Ohio Gas Company.

II.

ACTS OF APPELLEE IN MISSISSIPPI ARE EXCLUSIVELY IN FURTHERANCE OF APPELLEE'S INTERSTATE COMMERCE.

Among the necessities of this interstate commerce transaction, is for the natural gas in passing from the high pressure 22 inch trunk pipe line of appellee to distributor's small pipe line, to pass through a regulator to reduce the pressure, a meter in order that the exact quantity previously sold by contract may be determined and for a thermometer to be used to ascertain the temperature which affects the volume in measurement, and the furnishing of these instrumentalities by appellee at point of delivery does not

change this interstate transaction into an intrastate transaction; nor is the status of the transaction affected by the difference in price paid appellee by the distributor for gas sold to domestic and commercial consumers and gas sold to industrial consumers all of which constitute mere matters of detail and a method for calculating the quantity of gas sold and the total amount due therefor, as fixed by the prior contract of sale.

As heretofore stated appellee is not a distributor at retail to the ultimate consumer and from no fact in this record may it be inferred that appellee "treats" or 'prepares" gas for sale in Mississippi or does any other act in Mississippi, except what is absolutely necessary and exclusively in furtherance of appellee's interstate commerce in Mississippi. It is absolutely necessary that there be a regulator at the point of delivery where the retail distributor's pipe line taps the high pressure trunk pipe line of appellee. With the natural gas flowing at high pressure through the 22 inch trunk line of appellee, when turned into the retail distributor's small pipe line, necessarily, there must be a reduction in pressure, by having the gas merely to pass through a simple regulator to accomplish this. In addition, while appellee as vendor and the retail distributors in Mississippi as vendees, have executed a prior contract of sale, the exact measurement of the quantity of gas delivered to these retail distributors can only be accomplished by having the gas pass through a meter at the point of delivery, where the high pressure trunk pipe line of appellee is tapped by the retail distributor's pipe line. The use of a thermometer is merely to assist in fixing the unit of measurement at the point of delivery.

In the Ozark Pipe Line case, supra, the Court pointed out that as heretofore quoted, that the principal office of

the Ozark Pipe Line Company was in Missouri, where its records were kept, its employees within and without the state were paid, supplies were purchased, contracts were entered into, three pumping stations along the pipe line were maintained in Missouri, but all of these activities in Missouri were in furtherance of the pipe line operations and none of them constituted local or intrastate business.

It is also contended however, that in view of the fact that the prices for natural gas in this case varied according to whether the consumers were domestic and commercial or industrial, and appellee had access to the books of the retail distributor, that this constituted the doing of local or intrastate business by appellee. It is a matter of common knowledge that two or three industrial organizations may consume as much gas as a city of 50,000 population for domestic purposes. Therefore, very properly a difference in rates is allowed, and the respective quantities of domestic and commercial gas, and industrial gas, can only be definitely fixed by the consumption thereof. It is not contended that the retail distributor is an agent of appellee or is connected in any possible way with appellee. This contention is conclusively answered in the case of *Public Utilities of Kansas v. Landon*, supra, wherein local retail distributor was to pay for the gas acquired two-thirds of its receipts from the customers but the Court held that this fact did not affect the status of the interstate transaction which continued up to the delivery of the gas into the local mains for retail distribution to the ultimate consumer.

In the very recent case of *Furst v. Brewster*, 51 S. Ct. 295, in holding that shipment of goods from without state under contract constituted "interstate commerce" regardless of whether contract effectuated sale or created agency, Mr. Chief Justice Hughes said:

"The question is not as to sales made by Brewster in Arkansas, but as to the transactions between Brewster and Furst & Thomas. These transactions were clearly in interstate commerce, whether or not Furst & Thomas were agents of the Furst-McNess Company, and whether or not Brewster was an agent of Furst & Thomas. In pursuance of orders sent by Brewster in Arkansas to Furst & Thomas in Illinois, goods were shipped to Arkansas from the branch warehouse of Furst & Thomas in Tennessee. The ordering and shipment of the goods constituted interstate commerce, and the obligation to pay and the right to recover the amount due, according to the contract pursuant to which the goods were sent, arose in the course of that commerce. In International Text-Book Company v. Pigg, 217 U. S. 91, 107, 30 S. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, this court quoted with approval the language of the Circuit Court of Appeals for the Eighth Circuit, speaking by Judge Sanborn, in Butler Bros. Shoe Company, v. United States Rubber Company, 156 F. 1, 17, a case of consignments to a factor, that 'all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is transaction of interstate commerce.' Such commerce comprehends all the component parts of commercial intercourse between different states, and according to established principle, any state statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the commerce clause. Crutcher v. Kentucky, 141 U. S. 47, 57, 11 S. Ct. 851, 35 L. Ed. 649; Western Union Telegraph Company v. Kansas, 216, U. S. 1, 27, 30 S. Ct. 190, 54 L. Ed. 355; Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282, 290, 291, 42 S. Ct. 106, 66 L. Ed. 239."

See also: *Dozier v. Alabama*, 218 U. S. 124, 30 S. Ct. 649; *B. & O. S. W. R. Co. v. Settle*, 260 U. S. 166, 43 S. Ct. 29; *Brown v. Maryland*, 12 Wheaton 419, 6 L. Ed. 679.

III.

HAD APPELLEE BEEN ENGAGED IN INTRASTATE BUSINESS, THE STATUTE INVOLVED DOES NOT IMPOSE A PRIVILEGE TAX SOLELY ON INTRASTATE BUSINESS, BUT AFFIRMATIVELY IMPOSES A PRIVILEGE TAX ON ONE ENGAGED EXCLUSIVELY IN INTERSTATE BUSINESS.

In the case of *East Ohio Gas Company v. Tax Commission of Ohio*, 51 S. Ct. 499, supra, Mr. Justice Butler said:

> "It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. Pullman Co. v. Richardson, 261 U. S. 330, 338, 43 S. Ct. 366, 67 L. Ed. 682. New Jersey Tel. Co. v. Tax Board, 280 U. S. 338, 346, 50 S. Ct. 111, 74 L. Ed. 463. And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction, in order to be valid, must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition, and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. Sprout v. South Bend, 277 U. S. 163, 170-171, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45, and cases cited."

Tax laws should be liberally construed in favor of taxpayers *Burnet v. Niagara Falls Brewing Company*, 51 S. Ct. 262. All taxing statutes are to be construed most strongly against the taxing power. *Conrad v. Mississippi State Tax Commission*, 133 So. (Miss.) 652, *McKenzie v. Adams Banks Lumber Co.*, 157 Miss. 482, *Miller v. Illinois Central Railroad Co.*, 146 Miss. 422.

If the Legislature of Mississippi is clothed with the power to levy a privilege tax of $50.00 per mile on appellee's trunk pipe line through the state, or a privilege tax alone, of nearly one-tenth of the value of the natural gas sold and transported into Mississippi in addition to all other taxes, the Legislature could levy a privilege tax of $350.00 per mile or more by such taxation could destroy the interstate commerce business of appellee.

Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheaton 316, 431, 4 L. Ed. 579, said:

> "That the power to tax involves the power to destroy; . . . "

In his argument in this case, Mr. Webster said:

> "An unlimited power to tax involves, necessarily, a power to destroy; . . . "

So, even had appellee been engaged in intrastate commerce, which it was not, and even had the statute involved levied the privilege tax on intrastate commerce, which it did not, still the statute involved contravenes the Constitution of the United States because it affirmatively attempts to impose a privilege tax on a person operating pipe line or transporting natural gas throuh Mississippi and then proceeds to limit the privilege tax to trunk pipe lines. Nowhere in this record does it appear that appellee was engaged in intrastate business and nowhere in the statute involved does it appear that the privilege tax was imposed solely on account of intrastate business and as stated by Mr. Justice Brandeis in *Sprout v. South Bend*, 277 U. S. 263, 48 St. Ct. 502, 505 such a privilege tax is invalid.

CASES RELIED UPON BY APPELLANTS

There is no conflict presented by the cases cited by appellants and the cases cited by appellee; in fact, we respectfully submit that the cases cited by appellants in every instance, when analyzed, sustain appellee's position.

Appellants quote at length from *New Orleans, M. & C. R. Co. v. State,* 110 Miss. 290, in that case a domestic corporation (P. 299), wherein the Supreme Court of Mississippi passed on the question of whether a privilege tax on a railroad for operating a railroad business purely within the State of Mississippi (Syl. 2) is constitutional. Further, this decision cannot possibly be of any value in the case before the Court because it does not construe the statute involved here; in addition, nowhere in the railroad privilege tax statute does the phrase *"through the state"* appear and nowhere is the privilege tax limited to trunk lines. Before being construed by the Mississippi Supreme Court, just as the statute involved in this case has never been construed by the Mississippi Supreme Court, the United States District Court, composed of Circuit Judge Shelby, and District Judges Niles and Grubb, construed this railroad privilege tax statute in the case of *Illinois Central Railroad Company v. Mississippi Railroad Commission, et al.,* 229 Federal Reporter 248, 255, and District Judge Grubb for the Court said, after citing many cases from the Supreme Court of United States:

> "From them the conclusion is irresistible that a state statute exacting of one engaged in interstate commerce and governmental business a license for the privilege of doing business, in general terms and without expressly exempting from its terms interstate and governmental business, and which has not been construed to do so by the court of last resort of the state

of its enactment, is to be construed as exacting a license for engaging in all business, including interstate commerce and governmental business, as to persons or corporations so engaged, and void as to them, though so measured as not to come in conflict otherwise with the Constitution. Under the language of the act of Mississippi, railroad companies could be prosecuted for exercising the privilege of doing a railroad business without taking out a license, though they were engaged in business purely of an interstate and governmental character, and there has been no contrary construction of this act in this respect by the Supreme Court of Mississippi."

It will also be noted that the Supreme Court of Mississippi in that opinion quoted from by appellants based its decision on and quoted from *Baltic Mining Co. v. Massachusetts,* 23 U. S. 68, 34 S. Ct. 15, 58 L. Ed. 127, a case subsequently modified, and the very language quoted therefrom and made the basis of the decision of the Supreme Court of Mississippi, has been definitely disapproved by this Court, in *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203, 45 S. Ct. 477, 481, to quote:

"It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause, and the Fourteenth Amendment does not permit taxation of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 87, 34 S. Ct. 15, 58 L. Ed. 127, tends to support a different view it conflicts with conclusions reached in later opinions and is now *definitely disapproved.*"

In the case of *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 38 S. Ct. 295, 62 L. Ed. 632, relied upon by appellants, this case involved the business of seven different corporations, six of which were clearly engaged in local business in Massachusetts and the seventh, Cheney Bros. Co., it was decided, did not conduct a local business in Massachusetts as distinguished from interstate commerce, although an office was maintained in Boston with one office salesman and four other salesmen traveling through New England, also stock of goods being kept in the Boston office but only samples being used in soliciting and taking orders.

In the case of *Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, 42 S. Ct. 305, quoted by appellants, was involved an excise tax by the State of Illinois on a West Virginia corporation with all of its tangible property in Illinois, specifically levied on business done within the State of Illinois.

The case of *Sprout v. South Bend*, 277 U. S. 163, 48 S. Ct. 502, supra, and the very quotation of Mr. Justice Brandeis sustains the position of appellee, namely:

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business."

In the case of the statute involved, as hereinbefore shown, it clearly attempts to impose a privilege tax on one operating a pipe line or transporting natural gas through Mississippi and defines "pipe line" as used therein as including only trunk lines and not applying to pipe lines used solely for distributing gas or oil to the ultimate consumer near cities, nor as service lines.

The facts in the case of *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257, 48 S. Ct. 107, cited by appellants, are that the oil and gasoline shipped into Florida came to rest in storage tanks or tank cars, for distribution to different parts of the state as ordered, as Mr. Chief Justice Taft said:

> "It seems very clear to us on a broad view of the facts that the interstate or foreign commerce in all this oil ends upon its delivery to the plaintiff into the storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars, bulk stations, and drive-in stations, or directly by tank wagons to customers, is all intrastate commerce. This distribution is the whole business of the plaintiff in Florida. There is no destination intended and arranged for with the ship carriers in Florida at any point beyond the deliveries from the vessels to the storage tanks or tank cars of the plaintiff."

In addition, in the foregoing case, local taxes were paid on all of the products in the storage tanks on the Florida assessing date.

The case of *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 43 S. Ct. 643 involved a state tax in Texas for merchandise bought from another state in original packages that were in a state of rest in a warehouse and had become a part of a stock to be sold to wholesale dealers in Texas.

We see no occasion further to discuss in detail other cases cited by appellants since they do not conflict with appellee's position in this case.

VII.

CONCLUSION

In conclusion, we respectfully submit:

First. That the facts demonstrate conclusively that appellee is engaged solely and exclusively in interstate commerce in Mississippi.

Second. There is no act of appellee in Mississippi even tending to show that appellee is engaged in a local business or intrastate commerce in Mississippi.

Third. Even had appellee been engaged in a local business or in intrastate commerce in Mississippi, the statute involved makes no pretense of levying or imposing a privilege tax solely on account of intrastate commerce, but affirmatively and in words imposes a privilege tax on interstate commerce.

Fourth. Chapter 88 of the Laws of Mississippi of 1930 designated as the Privilege Tax Law of 1930 of Mississippi, contravenes Article 1, Section VIII, Clause 3, or the Commerce Clause, of the Constitution of the United States and Section 163 thereof is unconstitutional and void.

Appellee respectfully submits that the final decree of the Court below should be affirmed.

Respectfully submitted,

DAVID CLAY BRAMLETTE,
Attorney for Appellee.

We hereby certify that we have this day mailed a copy of the foregoing brief to Honorable George T. Mitchell, Attorney-General of Mississippi, Attorney for Appellants, by postage prepaid, at his Post Office address, Jackson, Mississippi.

This 5th day of October, A. D., 1931.

David Clay Bramlette
Attorney for Appellee.